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In the
# Supreme Court of the United States

MARVIN D. HORNE, et al.,

*Petitioners,*

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

JAMES S. BURLING
*Counsel of Record*
J. DAVID BREEMER
JENNIFER F. THOMPSON
*Of Counsel*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jsb@pacificlegal.org

*Counsel for Amicus Curiae Pacific Legal Foundation*

## QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

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## INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully files this amicus curiae brief in support of Petitioners Marvin D. Horne, et al.[1]

Founded in 1973, PLF is the nation's most experienced public interest legal organization defending Americans' property rights. PLF attorneys have participated as lead counsel or amicus curiae in several important cases in this Court in defense of the right of individuals to make reasonable use of their property, and to seek and obtain redress when that right is infringed. *See, e.g., Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). PLF attorneys also served as lead counsel in the landmark case, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), defining the scope of government's authority to impose exactions on land use permits under the Takings Clause, and in the more recent case, *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), affirming that the Takings Clause protects money, as well as real property, in land use permitting transactions.

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[1] All parties have been given timely notice of PLF's intent to participate in this case as amicus curiae, and all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court. PLF affirms under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

Because of its experience and familiarity with these issues, PLF believes that its brief will assist the Court in considering the Petition for Writ of Certiorari in this case.

## SUMMARY OF REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case severely undermines this Court's takings jurisprudence and threatens to discredit important principles of property law that enforce property owners' constitutional right not to have property taken without just compensation. One of those principles is the application of a straightforward, per se rule to government action that directly appropriates private property. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518 ("[W]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.") (quoting *Tahoe Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)). The decision below ignores that rule by failing to apply a per se test to the raisin marketing order appropriating the Hornes' raisins. It does so by impermissibly narrowing the concept of a "physical taking" to exclude personal—as opposed to real—property. There is no legal basis for such a distinction. To the contrary, this Court has long applied a per se analysis to the appropriation of personal property. *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 3-4 (1949) (applying a per se analysis to seizure of a business); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (applying a per se analysis to interest on a bank account); *Koontz*, 133 S. Ct. 2586 (finding government's

demand for money indistinguishable from demands for real property).

The decision below also creates a conflict by construing the raisin marketing order as a mere "use restriction," subject to this Court's permit exaction takings standards in *Nollan*, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Contra Nollan*, 483 U.S. at 831 (criticizing dissenting opinion's description of easement dedication requirement as a "mere restriction" on property use as opposed to a physical taking). Under that reasoning, any physical appropriation of private property could be recast as a mere "restriction on use," thus eviscerating the per se takings standards which this Court and other federal circuits have long endorsed. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 426 (1982) (finding small physical invasion of private property a per se taking); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (applying a per se analysis in challenge to state's appropriation of interest on lawyers' trust accounts and describing that interest as "private property"); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1291-96 (Fed. Cir. 2008) (applying a per se, physical takings analysis to government diversion of water).

Finally, the decision below creates a conflict by undermining the *Nollan* and *Dolan* standards themselves. It relegates them to little more than a means-ends analysis of the kind which this Court specifically disavowed as having any role in takings jurisprudence. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005) ("A means-ends test . . . is not a valid method of discerning whether private property

has been 'taken' for purposes of the Fifth Amendment.").

This Court should grant the Petition for Writ of Certiorari to resolve these conflicts.

## REASONS FOR GRANTING THE PETITION

### I

### THE DECISION BELOW IS IN SEVERE CONFLICT WITH THIS COURT'S AND OTHER CIRCUITS' TAKINGS JURISPRUDENCE APPLYING A PHYSICAL TAKINGS ANALYSIS TO GOVERNMENT APPROPRIATION OF PRIVATE PROPERTY

#### A. A Per Se Physical Takings Rule Applies to the Raisin Marking Order

When government appropriates private property, it effectuates a physical taking and must pay just compensation to the owner. U.S. Const. amend. V; *Brown*, 538 U.S. at 233 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.") (quoting *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). The rule applies broadly, regardless of how the property is appropriated. *See, e.g., Kimball Laundry*, 338 U.S. at 3-4 (seizure of laundry business during World War II constituted a per se taking); *Loretto*, 458 U.S. at 426 (state statute requiring landlords to allow installation of cable equipment on buildings caused a per se physical taking). And it applies even where the appropriation is neither total nor permanent. *See*

*United States v. Causby*, 328 U.S. 256, 265-68 (1946) (finding government liable for a taking where airplane overflights interfered with property owner's chicken farm); *Ark. Game & Fish*, 133 S. Ct. at 522 (finding government-induced flooding, although temporary in duration, is not exempt from the Takings Clause).

By carving out an exception to the per se rule for physical appropriations of personal property, the Ninth Circuit created a conflict with this Court's holdings, which have never sanctioned a constitutional distinction between real and personal property. In *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945), for example, this Court analyzed the Fifth Amendment's Takings Clause as encompassing the group of rights that a citizen possesses in regard to a "physical thing." *See also Loretto*, 458 U.S. at 435 ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'") (*quoting Gen. Motors Corp.*, 323 U.S. at 378). It then went on to find that the government's takings liability encompassed not only real property, but also "fixtures and permanent equipment destroyed or depreciated in value by the taking . [because] [a]n owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in the land and structures thereon erected." *Gen. Motors Corp.*, 323 U.S. at 383-84.[2] Similarly in *Webb's*, this Court unanimously held that a County's appropriation of interest accruing on an interpleader fund constituted a taking. 449 U.S. at 163-64 The *Webb's* Court was not troubled by the distinction between real and personal property, but it did find relevant the

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[2] The Court's holding explicitly covered both fixtures and trade fixtures.

difference between a mere deprivation of use and a "forced contribution to general governmental revenues." *Id.* at 163. While the former are analyzed under the ad hoc balancing test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), the latter constitute per se takings because "a State, by *ipse dixit*, may not transform private property into public property without just compensation." *Webb's*, 449 U.S. at 164.

Cases involving water rights are also instructive. In *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-55 (1950), this Court held that the Government committed a taking when it diverted water in such a way that left the claimants' lands without water, even though the claimants held valid riparian rights. Similarly, the Court found a taking where the Government appropriated the right of private water districts to collect water from a river, and where it allowed a power plant to draw the entirety of a river's flow, to the detriment of individual water rights holders. *Dugan v. Rank*, 372 U.S. 609, 620-21 (1963); *Int'l Paper Co. v. United States*, 282 U.S. 399, 404-08 (1931). In *Gerlach*, *Dugan*, and *International Paper*, "the Supreme Court analyzed the government action as a *per se taking*" even though no real property had been taken. *Casitas*, 543 F.3d at 1290 (emphasis added); *see id.* at 1294 (finding government-mandated water diversion "no less a physical appropriation" than the government's seizure of coal mines in World War II).

The Ninth Circuit's decision is likewise at odds with other circuits. In *Nixon v. United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992), the District of Columbia Circuit categorically rejected the Government's

argument that a per se taking may only occur with respect to real property. It correctly held that "the Government's inference that the per se doctrine must be limited to real property is without basis in the law" because "[o]ne may be just as permanently and completely dispossessed of personal property as of real property." *Id.* at 1285. Thus, Richard Nixon's presidential papers could not be taken into Government possession without just compensation. The same has been said in other circuits with respect to interest in a bank account, *Cerajeski v. Zoeller*, 735 F.3d 577, 580 (7th Cir. 2013), surplus political contributions, *Anderson v. Spear*, 356 F.3d 651, 669-70 (6th Cir. 2004), Lee Harvey Oswald's possessions, *Porter v. United States*, 473 F.2d 1329, 1335 (5th Cir. 1973) and fish, *United States v. Corbin*, 423 F.2d 821, 828-29 (10th Cir. 1970).

Because the marketing order requires the Hornes to transfer a percentage of their raisin crop to the government, this Court and at least five other circuits would recognize it as a per se taking. This Court should grant the Writ of Certiorari to overturn the Ninth Circuit's contrary ruling and reaffirm that the direct physical appropriation of private property is subject to a per se takings analysis.

### B. The Ninth Circuit's Application of This Court's Land Use Exaction Jurisprudence to the Raisin Marking Order Has No Basis in Law

Because a physical takings analysis applies, this Court's permit exaction jurisprudence in *Nollan* and *Dolan* is irrelevant to evaluating the constitutionality of the raisin marketing order. Those cases "'involve[d] a special application' of [the unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property the government takes *when owners apply for land-use permits.*" *Koontz*, 133 S. Ct. at 2594 (quoting *Lingle*, 544 U.S. at 547) (emphasis added).

In *Nollan*, coastal property owners Patrick and Marilyn Nollan challenged a requirement that they dedicate an easement across their beach front yard to the public, as a condition of obtaining a permit to build a house. 483 U.S. at 828. This Court struck down that condition as unconstitutional because there was no close connection, or "essential nexus" between the condition itself, and any negative impacts caused by the Nollan's house. *Id.* at 837-39. As a result, the purpose of the easement condition was "quite simply, the obtaining of an easement without payment of just compensation," which was "not a valid regulation of land use but an out-and-out plan of extortion." *Id.* at 837 (internal quotation marks omitted).

In *Dolan*, this Court considered permit conditions imposing easements for a storm drainage system and public pathway on business owner Florence Dolan's property as a condition of her expanding her plumbing and electrical supply store. 512 U.S. at 379-80.

Although the conditions satisfied *Nollan*'s "essential nexus" requirement—because the enlarged store would cause increased flooding and traffic which the easements would assuage—that connection alone was insufficient to justify the conditions. *Id.* at 391. This Court held that the Fifth Amendment also required the City to demonstrate "rough proportionality" between the required dedication and the impact of the proposed development by making an individualized assessment. *Id.* The City's conditions failed constitutional muster for lack of such an assessment. Together, *Nollan* and *Dolan* "allow[] the government to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz*, 133 S. Ct. at 2595.

Here, the Ninth Circuit applied the *Nollan/Dolan* rule to this case because it believed the rule "serves to govern this use restriction as well as it does the land use permitting process." *Horne v. U.S. Dept. of Agriculture*, 750 F.3d 1128, 1142 (9th Cir. 2014). But that is an inapt characterization of the raisin marketing order. The order does not restrict the Hornes' use of their raisins; it requires them to give their raisins to the government. And the *Nollan* Court specifically rejected the argument that a requirement to dedicate property to the government could be characterized as a "mere restriction on its use." 483 U.S. at 831 (rejecting Justice Brennan's description of the easement condition as a use restriction).

Perhaps most troubling, under the Ninth Circuit's reasoning, *any* requirement that people dedicate property to the government could be recast as a mere

restriction on the use of that property. Taken to its logical conclusion, that reasoning would foreclose any use of per se takings analysis in Fifth Amendment jurisprudence. Under *Loretto*, for example, any "permanent physical occupation" of property is a per se taking. 458 U.S. at 426. But why could not such a "permanent physical occupation" simply be re-characterized as a restriction on the right to use one's property? Under the Ninth Circuit's rationale, it could, and would. *Contra id.* at 439 (rejecting argument that "the law is simply a permissible regulation of the use of real property"). Similarly, the rule affirmed in *Casitas*, that government-mandated diversion of water is subject to a per se analysis, could be recast as a use restriction. Under the Ninth Circuit's rationale, the use of one's water right could be said simply to be exercised subject to government restrictions on its use. *Contra Casitas*, 543 F.3d at 1294 (rejecting the government's argument that the water diversion was a use restriction because "this case involves physical appropriation by the government"). Drawing a line around physical appropriations of private property, and affirming that such appropriations are always subject to a per se analysis as this Court and other circuits have done, is inconsistent with the Ninth Circuit's analysis. *See, e.g., Brown*, 538 U.S. at 233 (The "plain language [of the Fifth Amendment] requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a *physical appropriation*.") (emphasis added) (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)).

## II

## THE DECISION BELOW CONFLICTS WITH THIS COURT'S PERMIT EXACTION JURISPRUDENCE

### A. The Ninth Circuit's Description and Application of *Nollan* and *Dolan* Conflict with This Court's Precedent

The Ninth Circuit's decision conflicts with this Court's takings jurisprudence for another reason which threatens to set a dangerous precedent if left undisturbed: it relegates those standards to little more than a means-ends analysis of the kind this Court has rejected for takings claims. *See Lingle*, 544 U.S. at 542. Throughout its decision, the Ninth Circuit repeatedly describes *Nollan* and *Dolan* as requiring nothing more than a connection between the means and the ends of the challenged marketing order. *See, e.g.*, *Horne*, 750 F.3d at 1143 ("We now turn to the nexus requirement and ask if the reserve program 'further[s] the end advanced as its justification.'") (quoting *Nollan*, 483 U.S. at 837); *id.* at 1144 ("There is a sufficient nexus between the means and the ends of the Marketing Order. The structure of the reserve requirement is at least roughly proportional (and likely actually proportional) to Congress's stated goal of ensuring an orderly domestic raising market."). In other words, under the Ninth Circuit's approach, so long as the exaction (the requirement to dedicate raisins) furthers the government's purpose in imposing the exaction (having an "orderly domestic raisin market"), *Nollan* and *Dolan* are satisfied.

But that analysis—at least on its face—seems to ignore the important role that *impacts* from private

uses of property play in triggering a *Nollan/Dolan* analysis in the first place. As this Court recently explained in *Koontz*, the *Nollan* and *Dolan* tests are premised on the idea that government may "condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands *and the social costs of the applicant's proposal.*" 133 S. Ct. at 2595 (emphasis added). Those "social costs" are what authorize the lawful demand for an exaction of property as a condition of obtaining a permit in the first place. After all, the easement condition in *Nollan* was struck down because the Commission failed to show the easement would "remedy any additional congestion on [the beach] *caused by* construction of the Nollans' new house." 483 U.S. at 838-39 (emphasis added); *see also Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (traditional land use regulation is valid because there exists "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy").

Many authorities have long recognized causation as the essence of the *Nollan/Dolan* analysis. *See* Timothy M. Mulvaney, *Proposed Exactions*, 26 J. Land Use & Envtl. L. 277, 281 (2011) (In *Nollan*, "the state did not meet its burden of proving that a condition requiring a beach access pathway bore an 'essential nexus' *to the impacts caused by the development.*") (emphasis added); Pierson Andrews, Nollan *and* Dolan: *Providing a Roadmap for Adopting a Uniform System to Determine Transportation Impact Fees*, 25 BYU J. Pub. L. 143, 146 (2011) ("In *Nollan*, the United States

Supreme Court concentrated on the connection between the exaction required by the government and *the burden imposed by the new development.*") (emphasis added); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 Wash. & Lee L. Rev. 373, 378 (2002) ("*Nollan* established that an 'essential nexus' must exist between a development condition and the amelioration of a legitimate public problem *arising from the development.*") (emphasis added); James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause*, 27 Tex. Tech L. Rev. 73, 96 (1996) ("*Nollan*'s essential nexus test requires the government to establish a more direct, causal connection between land dedication conditions and the impact of real estate development on infrastructure and public facilities."); Brian T. Hodges & Daniel A. Himebaugh, *Have Washington Courts Lost Essential Nexus to the Precautionary Principle?* Citizens' Alliance for Property Rights v. Sims, 40 Envtl. L. 829, 829 (2010) ("The essential nexus test requires the government to establish a *cause-and-effect* connection between development and an identified public problem before placing conditions on development.") (emphasis added).

Here, the Ninth Circuit applied *Nollan / Dolan* not by looking to see if the federal government had demonstrated causation or rough proportionality between the Hornes' sale of their raisins on the open market and the alleged market volatility, but by *assuming* that the marketing order scheme works.

*Horne*, 750 F.3d at 1143 ("By reserving a dynamic percentage of raisins annually such that the domestic raisin supply remains relatively constant, the Marketing Order program furthers the end advanced: obtaining orderly market conditions."). Under *Nollan* and *Dolan*, such an assumption is not sufficient. *See, e.g., Dolan*, 512 U.S. at 395 (striking permit conditions for the City's failure to meet "its burden" of demonstrating rough proportionality between the conditions and the impacts of development); *id.* at 396 (Stevens, J., dissenting) (arguing that "[t]he Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city . . .").

It is difficult to see how the Ninth Circuit's consideration of the marketing order differs from the "substantially advances" inquiry which this Court specifically disavowed as a takings test in *Lingle*. There, Chevron challenged a Hawaii regulation restricting the amount of rent it could charge its service station lessees as a taking. 544 U.S. at 533-34. It alleged that the regulation failed to "substantially advance a legitimate state interest" and therefore failed this Court's takings test as articulated in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *Lingle*, 544 U.S. at 534. Because the lower court found that the law would not achieve that purpose, it struck it down as a taking under the "substantially advances" standard. *Id.* at 535-36. In doing so, the trial court considered competing expert testimony about the effectiveness of the law, and whether it would actually further the Hawaiian Legislature's purpose of protecting independent gasoline dealers from the

effects of market concentration. *Id.* The Ninth Circuit affirmed. *Id.* at 536.

On appeal, this Court reversed because it found that the *Agins* "substantially advances" test was not an appropriate takings test. *Id.* at 540. Rather, that test "prescribes an inquiry in the nature of due process." *Id.* In reaching that conclusion, the *Lingle* Court rejected the Ninth Circuit's "means-ends" analysis as having any role in defining unconstitutional takings. The Court stated:

> The "substantially advances" formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge . . But such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.

*Id.* at 542.

Here, by focusing on the means-ends connection between the raisin marketing order and the government's goal of creating stable market conditions, the Ninth Circuit diluted *Nollan* and *Dolan* to a means-ends analysis of the kind rejected in *Lingle*. Because that standard does not squarely place the burden on government to demonstrate a close connection between an exaction appropriating private property, and the need to mitigate harmful impacts of a property owner's use of that property, the court's analysis fails the *Nollan/Dolan* standard.

This Court should grant certiorari to overturn the Ninth Circuit's decision because it undermines the *Nollan/Dolan* test as a robust check on government appropriations of private property, thereby conflicting with this Court's precedent.

## CONCLUSION

The Ninth Circuit's decision conflicts with and undermines this Court's and other Circuit's takings jurisprudence, to the great detriment of property owners, thus raising important issues of federal law. For these reasons, this Court should grant the Petition for Writ of Certiorari.

DATED: October, 2014.

Respectfully submitted,

JAMES S. BURLING
*Counsel of Record*
J. DAVID BREEMER
JENNIFER F. THOMPSON
*Of Counsel*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jsb@pacificlegal.org

*Counsel for Amicus Curiae*
*Pacific Legal Foundation*